



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

AUG 27 2008

Ms. Dorothy Rice, Executive Director
California State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Rice:

The U.S. Environmental Protection Agency has reviewed the State Water Resources Control Board's Policy for Compliance Schedules in National Pollutant Discharge Elimination System Permits ("Policy"). By this letter, EPA is approving the Policy. By its terms, the Policy authorizes the use of compliance schedules in certain instances and applies to all NPDES permits adopted by the Water Boards that must comply with Clean Water Act section 301(b)(1)(C) and that are modified or reissued after the effective date of the Policy. The Policy was adopted by the State Water Board on April 15, 2008, approved by the State Office of Administrative Law on June 26, 2008, and submitted to EPA on June 27, 2008. The Policy supersedes compliance schedule-authorizing policies in effect in various Basin Plans, but does not supersede the compliance schedule-authorizing provision for California Toxics Rule ("CTR") criteria in the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California ("SIP"), and specifically provides that compliance schedules for existing CTR criteria are authorized only under the SIP.

Section 303(c) of the Clean Water Act requires EPA to review and approve or disapprove new or revised water quality standards submitted by a state. Under EPA's water quality standards regulations, a state has discretion to include in its standards "policies generally affecting their application and implementation, such as mixing zones, low flows and variances." 40 C.F.R. § 131.13. Though discretionary with the state, the Administrator has stated that authorizing provisions for compliance schedules such as those described in the Policy fall within the categories of implementation policies and procedures subject to EPA review under 40 C.F.R. § 131.13. In re Star-Kist Caribe, Inc., 3 E.A.D. 172, 182-183, n16 (Adm'r 1990), modification denied, 4 E.A.D. 33 (EAB 1992); In re City of Ames, 6 E.A.D. 374 (EAB 1996). As such, authorizing provisions for compliance schedules are subject to EPA review and approval under CWA section 303(c).

We are pleased to note that the Policy incorporates the recommendations in EPA's California Permit Quality Review Report on Compliance Schedules ("PQR") (October 31, 2007), and specifically states the State Water Resources Control Board's intention to implement the recommendations in the PQR. We commend the Board for its thorough and thoughtful analysis of the issues addressed in the Policy. The Policy will undoubtedly enhance the consistency in the Regional Water Boards' implementation of water quality standards, and, by

setting strict standards for the use and implementation of compliance schedules, will improve the quality of permits, and increase protection of California's waters.

The Policy specifies that where the Water Board (defined to include the State Water Resources Control Board as well as Regional Water Quality Control Boards) determines that an existing discharger needs additional time to implement actions to comply with a permit limitation that is more stringent than the limitation previously imposed (including a permit limitation for a pollutant that was not limited in prior permits), and the permit limitation implements a new, revised or newly interpreted water quality standard, and the discharger complies with application requirements set forth in the Policy, the Water Board may include a compliance schedule in the discharger's NPDES permit. EPA has reviewed the Policy and finds it consistent with the relevant provisions of the Clean Water Act and EPA's regulations regarding compliance schedules at 40 C.F.R. §122.47. Specific provisions of the Policy are discussed below.

Compliance "as soon as possible"

Consistent with 40 C.F.R. § 122.47(a)(1), the Policy at paragraph (6)(a) explicitly requires that any compliance schedule must require compliance as soon as possible. This important requirement is echoed throughout the Policy. For example, the ninth whereas clause specifically states the intent of the State Water Board "that any schedules be granted for the minimum amount of time necessary to achieve compliance." Paragraph 4(f), Application Requirements, requires the permit applicant to submit documentation that the proposed compliance schedule is as short as possible, including specific information about industry experience with the time typically required to construct similar facilities or implement similar programs as those that will be implemented during the proposed compliance schedule. Paragraph (9) requires the permit to include a finding that the schedule requires compliance as soon as possible, and the permit fact sheet to adequately describe the basis for that finding. The Policy at paragraph (6)(b) establishes a maximum length for compliance schedules of ten years from the date of adoption, revision, or interpretation of the applicable water quality objective. However, this paragraph does not guarantee any discharger a 10-year compliance schedule; rather, compliance must be attained as soon as possible, and no later than 10 years after the relevant water quality objective is adopted, revised, or newly interpreted, except when the compliance schedule is for implementing wasteload allocations in certain total maximum daily loads ("TMDLs").

While compliance schedules for implementing wasteload allocations in certain TMDLs may, pursuant to paragraph (6)(c), exceed ten years in duration, they still must be as short as possible, as stated in paragraph (6)(c)(ii). Additionally, such schedules must derive from a TMDL implementation plan that includes a maximum length for compliance schedules for attaining water quality based effluent limitations based on the assumptions of the wasteload allocations in the TMDL, and any resulting schedules in specific permits must be both as short as possible, and within the limits set forth in the TMDL implementation plan. We find this consistent with the Clean Water Act and EPA regulations, which do not set a maximum length for compliance schedules other than the soon-as-possible requirement in the regulations at 40 C.F.R. § 122.47(a)(1). We also note that an important check on the length of compliance

schedules for implementing wasteload allocations in TMDLs will be the public scrutiny of TMDLs before the Water Boards, along with the opportunity for public comment on the permits themselves.¹

In addition to the general requirement that the discharger demonstrate to the satisfaction of the Water Board that the discharger needs time to implement actions to comply with a more stringent permit limitation specified to implement a new, revised, or newly interpreted water quality standard, the Policy at paragraph (4) identifies specific information the discharger must submit to the permitting authority in order to justify both the threshold necessity of a compliance schedule, and the length of the schedule. While neither the Clean Water Act nor EPA's regulations specify the particular items of information the discharger must submit in order to obtain a compliance schedule, the information required by the Policy is reasonably related to the requirements in EPA regulations that the compliance schedule be as short as possible and is consistent with the recommendations EPA provided California in the PQR. EPA supports California's inclusion of these specific information requirements in the Policy. They provide clarity and guidance to dischargers – and to the Regional Water Boards – regarding the kind of information dischargers should submit to justify the necessity, length, and components of a compliance schedule.

“When appropriate”

Under 40 C.F.R. § 122.47(a), a compliance schedule may be included in a permit only when “appropriate.” Consistent with this requirement, paragraph (9) of the Policy requires that the permit include findings that the compliance schedule is necessary, along with findings that the schedule requires compliance as soon as possible. Paragraph (5) of the Policy specifically places on the Water Boards the responsibility for “thoroughly evaluating the information submitted by the discharger in its application and, in particular, for ensuring that the discharger has adequately demonstrated the need for time to implement actions, such as designing and constructing facilities or implementing new or significantly expanded programs and securing financing, if necessary, to comply with a more stringent permit limitation specified to implement a new, revised, or newly interpreted water quality objective or criterion in a water quality standard.” Many of the Application Requirements in paragraph (4) address whether a compliance schedule would be appropriate, and the exclusions from the Policy set forth in paragraph (2) identify examples of specific situations when the State does not consider a compliance schedule to be appropriate.

Interim dates and requirements

¹ Compliance schedules for implementing wasteload allocations in certain TMDLs are also treated differently in the “Grandfather Clause,” paragraph (3) of the Policy. This clause states that the Policy shall not apply to existing compliance schedules in permits, but that such schedules cannot exceed ten years. However, grandfathered schedules can exceed 10 years if consistent with a compliance schedule-authorizing provision that was approved by U. S. EPA under CWA section 303(c) and that implements wasteload allocations in a TMDL. We note that while EPA approves TMDLs under CWA section 303(d), the Policy's Grandfather Clause only applies where EPA has also approved, under CWA section 303(c), the compliance schedule-authorizing provision in the TMDL's implementation plan.

Incorporating the definition of “schedule of compliance” at Clean Water Act section 502(17), the Policy defines “compliance schedule” as a schedule of remedial measures, including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

Consistent with 40 C.F.R. § 122.47(a)(3) and (4), paragraph (7) of the Policy specifies that an authorized compliance schedule shall include interim requirements and dates for their achievement, that there shall be no more than one year between interim dates, and that the discharger must notify the Water Board, in writing, no later than 14 days following each interim date, of its compliance or noncompliance with the interim requirements. Additionally, the Policy also specifies that the Water Board shall establish interim numeric limitations for the pollutant in the permit, describes the minimum requirements for the interim numeric limitations, and provides that the Water Board may also impose interim requirements to control the pollutant, such as pollutant minimization and source control measures. The entire schedule, including both interim and final limits and other requirements, is required to be included as enforceable terms of the permit, pursuant to paragraph (8) of the Policy.

New dischargers

The Policy at paragraph (2)(a) provides that new dischargers cannot be given compliance schedules, defining new dischargers in paragraph (1)(c) as dischargers that commenced construction after a new, revised, or newly interpreted water quality objective or criterion in a water quality standard becomes applicable. While this differs from the definition of new discharger in 40 C.F.R. § 122.2, which essentially defines new dischargers as facilities that began discharging after 1979, it is consistent with 40 C.F.R. §§ 122.2 and 122.47(a)(2), which taken together provide that a facility considered to be a new discharger under EPA’s definition can obtain a compliance schedule only for requirements issued or revised after commencement of construction. Section 122.47(a)(2) additionally provides that, even if a new discharger began construction before issuance or revision of the new requirement, it cannot obtain a compliance schedule for a requirement that was issued or revised more than three years before commencement of the relevant discharge. This provision is not expressly addressed in the Policy. However, the Water Boards, when determining whether to grant a compliance schedule in the context of a particular NPDES permit, are constrained by the federal permitting regulations, including 40 C.F.R. § 122.47(a)(2), which have been incorporated by reference as part of California’s NPDES program requirements through California Water Code 13370 and 23 Code of Regulations § 2235.2 (“waste discharge requirements for discharge from point sources to navigable waters shall be issued and administered in accord with the currently applicable federal regulations for the ...NPDES program.”). Therefore, even though this specific part of section 122.47 has not been specifically included in the Policy, this does not make the Policy inconsistent with the regulation.

Newly-interpreted standards and newly-detected pollutants

The Policy in paragraph (1)(e) defines a newly-interpreted water quality standard as “a narrative objective or criterion that, when interpreted during NPDES permit development ... results in a permit limitation more stringent than the limit in the prior ... permit....” This

definition is consistent with EPA's longstanding interpretation that compliance schedules may be issued, where "appropriate" and consistent with 40 C.F.R. 122.47, in permits whose more stringent effluent limits are driven either by post-1977 (either new or revised) water quality standards or by post-1977 interpretations of pre-1977 water quality standards. Paragraph (1)(e) in combination with Paragraph 2 also authorizes compliance schedules (again only where "appropriate" and consistent with 40 C.F.R. 122.47) in the limited situation where a discharger cannot immediately comply with a new permit limit for a pollutant that was newly detected in the discharger's effluent using new analytical techniques developed after the prior permit was issued. EPA agrees with California that this is a situation where it may be appropriate, assuming the requirements of 122.47 are met, to include a compliance schedule in a permit. Following development of a new more sensitive analytical method, the discharger and permitting authority know for the first time that the discharger's effluent contains a pollutant at levels that require a water quality-based effluent limitation. The rationale for saying that a discharger may be allowed a compliance schedule in this situation is the same as the rationale for when compliance schedules may be allowed generally, i.e., the discharger may not be able to comply immediately with the new effluent limit, but should be able to do so within a specified time following a schedule of specific interim measures set forth as permit terms, if deemed appropriate by the permitting authority.

EPA approval action

In summary, the Policy authorizes California's Water Boards to include compliance schedules in NPDES permits issued to existing discharges for more stringent water quality-based effluent limitations implementing new, revised or newly interpreted water quality standards. The inclusion of such schedules is discretionary with the Water Boards, and the exercise of discretion is subject to a number of key limitations, previously summarized. Because the Policy is consistent with the Clean Water Act and EPA regulations, we approve it.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act ("ESA") provides that each federal agency shall, in consultation with the U.S. Fish and Wildlife Service and the U.S. National Marine Fisheries Service (the "Services"), ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any federally-listed endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. On August 11, 2008, EPA initiated informal consultation with the Services on our action concerning the Policy. Our approval is subject to the outcome of that consultation.

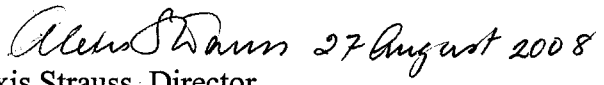
Conclusion

Because EPA is approving the statewide Policy, EPA is taking no action on the compliance schedule-authorizing policy for the San Diego Regional Water Quality Control Board submitted to EPA on June 22, 2007. Even if EPA were to approve the San Diego policy, it would be immediately superseded by the statewide Policy. In addition, EPA is not taking action on three authorizing provisions related to specific TMDLs adopted by the Los Angeles

Regional Water Quality Control Board and submitted to EPA on January 22, 2007 (two submissions) and September 4, 2007, as we have determined that these provisions may be implemented under the statewide Policy, and EPA approval is not necessary.

EPA commends State Water Board staff for its excellent work on the Policy. If there are any questions regarding our action, please contact Janet Hashimoto or Matthew Mitchell, of my staff, at (415) 972-3452 or 972-3508 respectively, or refer counsel to Suzette Leith at (415) 972-3884. As always, we look forward to continued cooperation with the State in achieving our mutual environmental goals.

Sincerely,

 27 August 2008
Alexis Strauss, Director
Water Division

cc: Executive Officers, RWQCBs 1-9
Darrin Polhemus, SWRCB, Division of Water Quality
Michael Lauffer, SWRCB Chief Counsel
Caroline Whitehead, USEPA, Office of Water (4305)